

STATE OF MICHIGAN
COURT OF APPEALS

STATE FARM FIRE & CASUALTY
COMPANY,

Plaintiff-Appellee,

v

BAY CITY ELECTRIC LIGHT & POWER,

Defendant-Appellant,

and

CITY OF BAY CITY,

Defendant.

UNPUBLISHED
February 18, 2010

No. 289466
Bay Circuit Court
LC No. 07-003401-CZ

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant Bay City Electric Light & Power appeals as of right the trial court's November 26, 2008 order, denying summary disposition as to count III of plaintiff's complaint. The trial court held that plaintiff's claim of "express and/or implied warranties of fitness and merchantability" was brought pursuant to contract, so defendant was not entitled to governmental immunity. This appeal has been decided without oral argument pursuant to MCR 7.214(E). We affirm.

The Governmental Immunity Act, MCL 691.1401 *et seq.*, does not bar liability based on contract. *Koenig v City of South Haven*, 460 Mich 667, 675; 597 NW2d 99 (1999) ("[G]overnmental immunity does not extend to contract actions even when the contract action arises out of the same facts that would support a tort action."). Claims based on warranties of fitness and merchantability are based in contract, being governed by MCL 440.2314, which provides in relevant part: "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Warranties of fitness and merchantability apply to the sale of electricity, and to prevail, a plaintiff must show both a defect in the electricity when it left the manufacturer and proximate causation. *Buckeye Union Fire Ins Co v Detroit Edison*, 38 Mich App 325, 328, 330; 196 NW2d 316 (1972). The critical point regarding when electricity leaves the manufacturer is when it passes through the

customer's meter. *Id.* Here, plaintiff presented evidence that the defect was present when it passed through its insured's meter. A contract action existed.

Moreover, we disagree that there was no valid contract between plaintiff's insured and defendant. While the preexisting duty rule negates any implied contract theory, *Mallory v Detroit*, 181 Mich App 121; 449 NW2d 115 (1989); *Powers v People's Community Hosp Auth*, 183 Mich App 550; 455 NW2d 371 (1990), defendant did not have a preexisting duty to provide power to plaintiff's insured. It provided power pursuant to a contract. Defendant may have had additional legal duties to repair and maintain power lines, but no authority precludes claims based on separate contractual duties to individual customers. The action at issue was not barred by governmental immunity where it was a valid contract action. Summary disposition was properly denied.

Defendant also argues that the claim sounded in tort and is therefore barred by governmental immunity. Defendant cites *Williams v The Detroit Edison Co*, 63 Mich App 559; 234 NW2d 702 (1975), for the proposition that the doctrine of implied warranty in tort, not contract, is applicable to the installation and delivery of electrical services. However, that is not what *Williams* held. In *Williams*, the plaintiff's husband was killed when an electrical line was struck by a backhoe and fell on him while he was constructing a water line. *Id.* at 563. The *Williams* Court first observed that electricity "is a service rather than a 'good,'" but the doctrine of implied warranty was not so restricted that it could not apply. The *Williams* Court also concluded that because the decedent was a third party who had no privity with defendant, the suit must be based in tort rather than contract. *Id.* at 564-565. The *Williams* Court did not hold that a plaintiff is necessarily limited to a tort action when asserting a breach of implied warranty of merchantability for electricity. In contrast to the situation in *Williams*, privity does exist in this case.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis